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No. 93-1338

# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

J. ALEXANDER SECURITIES, INC.,

Petitioner,

vs.

SIGNE MENDEZ,

Respondent.

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## PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE SECOND APPELLATE DISTRICT

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## REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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**RESPONDENT IGNORES THE SIMPLE FACT THAT THE CASH ACCOUNT AGREEMENT WAS THE CONTRACT BETWEEN THE CUSTOMER AND THE FIRM AND IT UNEQUIVOCALLY PROVIDED FOR ARBITRATION AND THE APPLICATION OF NEW YORK LAW.**

A copy of the "Cash Account Agreement" was introduced at the arbitration by Respondent and was included in the record on appeal in California (C8 pp. 164-165). Respondent was not on margin and this was the only signed agreement she had with the firm.[1]

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[1] As noted in the Petition for Writ of Certiorari, most brokerage firms have arbitration provisions in margin

The agreement expressly provided for arbitration and for the application of New York law and was referred to, and quoted from, extensively by the California Appellate Court. See Petition, App. A2-4. The NASD Code of Arbitration Procedure requires that any controversy be submitted to arbitration "as provided by any duly executed and enforceable written agreement or upon demand of the customer."[2] When the matter was originally submitted to arbitration before the NASD, Respondent's

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agreements but many do not have such provisions in cash account agreements. See Petition, p. 26, n. 13.

[2] Thus, even without an agreement, the customer can require the firm to arbitrate; but not vice versa.



claim did not even include a request for punitive damages.[3]

**PETITIONER MADE NO EXPRESS OR KNOWING WAIVER OF ANY CONSTITUTIONAL RIGHTS.**

Respondent argues that because punitive damages were claimed, as well as compensatory damages, and all controversies were submitted to arbitration (without the express invocation of Haslip), that the arbitrators' award cannot now be challenged and any rights are waived. But nothing in the submission of the

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[3] Petitioner did not really have a choice about whether to submit to arbitration if the customer demands it (see NASD Sec. 12(a); C9 p. 196), but nothing in the submission specifically focuses on remedies and no mention whatever is made of punitive damages.

matter or the arbitrators acting on the punitive damage request is sufficient to constitute a waiver of constitutional rights under Haslip. The "implied acquiescence" rule applied by a California appellate court to affirm an award of punitive damages in Baker v. Sadick, 162 Cal.App.3d 618, 626, 208 Cal.Rptr. 676, 681 (1984) is a lesser standard and cannot be invoked to infer waiver of a constitutional right. Fuentes v. Shavin, 407 U.S. 64, 94 n. 31, 92 S.Ct. 1983, 2001 n. 31, 32 L.Ed.2d 556 (1972). The waiver must be a knowing one and not merely the failure to assert it. Bueno v. City of Donna, 714 F.2d 484, 493 (5th Cir. 1983).[4]

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[4] Considering the chances very unlikely that punitive damages would be



Respondent expressly asserts in the Brief in Opposition that the award "in the absence of fraud, . . . is not reviewable as a matter of law or equity." Brief in Opposition, p. 7. This very assertion illustrates how Haslip's due process concern about the unbridled and unreviewable imposition of punitive damages, applies with even greater force in the arbitration setting. The basis for the Garrity rule was the very same concern for the potential arbitrary and penal power implicit in any award of punitive damages, which award, by its

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awarded against Petitioner, no effort was made to argue Garrity or Haslip to the arbitrators. Even under California law no punitive damages could have been awarded in this case by a California court where there was never any evidence of the defendant's net worth. Adams v. Murakami, 54 Cal.3d 105, 284 Cal.Rptr. 318 (1991).

nature, requires "rather close judicial supervision." See Petition for Writ of Certiorari, p. 33.

**RESPONDENT CONFUSES SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS; HASLIP IDENTIFIED A PROCEDURAL DUE PROCESS RIGHT WHICH CANNOT BE WAIVED BY IMPLICATION.**

Respondent erroneously characterizes New York's Garrity rule as to the availability of the remedy of punitive damages as "procedural restrictions on arbitrations" and not part of the substantive law of New York. Respondent's Brief in Opposition, p. 24. Respondent goes on to assert, without citation to any California authority, that California would not follow such "procedural restrictions." Ibid.

Citing this Court's decision in



Browning-Ferris Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 278, 109 S.Ct. 2909, 2922, 106 L.Ed.2d 219 (1989), the Second Circuit noted:

> "The measure of damages in general is a matter controlled by New York substantive law where federal jurisdiction in New York is predicated on the diversity of the parties. [citations] It follows that the Garrity rule prohibiting the award of punitive damages by arbitration must be applied. That the rule is grounded in state policy concerns renders it no less a rule of substantive law." Fahnestock & Co., Inc. v. Waltman, 935 F.2d 512, 518 (2nd Cir. 1991).

The right to punitive damages is certainly no less a rule of substantive law where New York state law is applicable by agreement, as opposed to diversity jurisdiction.

The right of due process identified in Haslip is based on the fundamental notion that any delegation of power to award punitive damages to an unrestrained decision-maker violates due process of law -- regardless of the amount actually awarded.[5] "[O]ur sensibilities about the process are offended" whenever any

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[5] Compare the substantive due process right addressed in TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. ___, 111 S.Ct. 2711, 125 L.Ed.2d 366 (1993) which is concerned with the amount of the award by protecting a defendant from a "grossly excessive" award -- a punitive damage award out of all proportion to the defendant's culpability.



fact-finder, be it jury, judge or arbitrator "is left to its own devices to take property or mete out punishment to whatever extent it feels is best in the course of the process." Mattison v. Dallas Carrier Corp., 947 F.2d 95, 105-06 (4th Cir. 1991). The procedural right of due process in Haslip, and not addressed in TXO Prod., supra, 113 S.Ct. at 2726-27 (Scalia, concurring), is the unlimited discretion to impose punitive damages. Without meaningful judicial review, any award of punitive damages is violative of due process.[6]

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[6] This Court granted certiorari in January, 1994, to consider whether there is a constitutional right to post-verdict review of a jury's award of punitive damages. Honda Motor Co. v. Oberg, ___ U.S. ___, 114 S.Ct. 751, 127 L.Ed.2d 69 (1994).

Arbitration, to be speedy and relatively inexpensive, necessarily demands that parties waive certain substantive and procedural rights available in judicial proceedings. This is what the Ninth Circuit meant when it said the defendant could not agree to arbitrate all disputes and then argue that "without the formalities of the courtroom," such as the absence of rules of evidence, that defendant was deprived of due process. Submission to arbitration must encompass giving up some procedural and "fair hearing" rights which would otherwise be entirely inconsistent with a cheap, speedy informal system of dispute resolution. Todd Shipyards Corp. v. Cunard Lines, Ltd., 943 F.2d 1056, 1063-64 (9th Cir. 1991).



However, there are many rights not waived by the mere act of submitting to arbitration and which rights are not contrary to the very process of arbitration. California courts have held for example that, in the absence of an express agreement, arbitrators have no implicit authority to award attorneys fees, award tort damages in a contract dispute, or impose contempt sanctions for a party's failure to comply with an arbitrator's orders.[7] The parties can waive these rights, of course, but do not do so by the mere submission of the case

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[7] Thompson v. Jespersen, 222 Cal.App.3d 964, 272 Cal.Rptr. 132 (1990); Cobler v. Stanley, Barber, et al., 217 Cal.App.3d 518, 265 Cal.Rptr. 868 (1990); Luster v. Collins, 15 Cal.App.4th 1338, 19 Cal.Rptr.2d 215 (1993).

to arbitration.[8]

Thus the question in whether the right in Haslip is necessarily inconsistent with the existence of arbitration and whether such right imposes an undue burden on the arbitration process. Hannah v. Larche, 363 U.S. 420, 442, 80 S.Ct. 1502, 1515 (1960).

No judge or appellate court can meaningfully review an arbitrator's award of punitive damages because there is no

[8] Even the reverse is true, parties are deemed to waive specific findings of fact by submitting to arbitration under the rules of the NASD but where the parties had expressly agreed that findings would be required, it was error to render an award without such specific findings. Western Employers Ins. Co. v. Jeffries & Co., Inc., 958 F.2d 258 (9th Cir. 1992).



"record" for review.[9] Clearly Haslip demands there be no unfettered or unrestrained awards of punitive damages, while arbitration demands "finality" through unreviewable findings. The only way to reconcile these competing demands is to mandate, as a matter of constitutional law, that arbitrators lack any implied (not express) authority to award punitive damages. Haslip imposes no burden on the arbitration process. The result is simply the unavailability of punitive damages in arbitration, absent express authorization.

Here, there was no express or

[9] An arbitrator's award is "rendered by paths neither marked nor traceable and not subject to judicial review." Moncharsh v. Heily & Blase, 3 Cal.4th 1, 25, 10 Cal.Rptr.2d 183, 198 (1992).

knowing waiver by the mere submission of all "controversies" to arbitration. Indeed, the New York choice-of-law provision, if anything, provided Petitioner with a reasonable expectation that punitive damages would not be available in any arbitration with Respondent. As the court noted in Mastrobuono v. Shearson Lehman Hutton, Inc., (7th Cir. March 30, 1994) ___ F.3d ___, 1994 U.S. App. Lexis 5989: "Federal policy 'favors arbitration agreements,' Moses H. Cone, 460 U.S. at 24, not "'arbitration' per se." App. A-S29. Nor does federal policy favor any specific remedy or damages in arbitration. The parties agreed to the application of New York law where punitive damages are unavailable in arbitration. The agreement is valid and enforceable and



its enforcement is not in any way inconsistent with federal policy or the FAA or any prior decision of this court. Unreviewable punitive damage awards cannot be reconciled with Haslip. Petitioner is entitled to strike the punitive damage portion of the award as beyond the powers of the arbitrators.

It is respectfully requested that a writ of certiorari issue to review the opinion of the California Appellate for the Second Appellate District.

Respectfully submitted,

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